Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

JEROME J. WISNESKI,

Petitioner,

v

RICHARD LEMARBE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JENNIFER M. GRANHOLM
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Leo H. Friedman
John L. Thurber
Assistant Attorneys General

Attorneys for Petitioner

55PP

QUESTION PRESENTED FOR REVIEW

The doctrine of qualified immunity requires (1) that a constitutional violation be alleged; and (2) that the alleged conduct be clearly established as a constitutional violation. *Saucier v. Katz*, 533 U.S. 194; 121 S. Ct. 2151; 150 L Ed 2272 (2001). To establish an Eighth Amendment violation for a failure to provide medical care, a prisoner must establish that the prison official acted with deliberate indifference. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Deliberate indifference requires that "[A] prison official may be held liable under the Eighth Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

Dr. Wisneski performed exploratory surgery to determine the source of fluid in Mr. LeMarbe's abdomen and then subsequently referred him to a specialist when he could not locate the source of the fluid. Did the Court of Appeals err in denying qualified immunity when it held that Dr. Wisneski acted with deliberate indifference?

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OPINIONS BELOW

The September 19, 2001 opinion of the Court of Appeals is reported at 266 F.3d 429 (6th Cir. 2001), and is reprinted in the Appendix to this Petition, App. 1a-24a. The prior opinion of the United States District Court for the Eastern District of Michigan entered on March 31, 2000, is not reported, and is reprinted in the Appendix to this Petition, App., pp 23a-29a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on September 19, 2001. On December 7, 2001, the Court of Appeals issued its Order denying Dr. Wisneski's Petition for Rehearing En Banc. App., p 30a.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U. S. Const. amend VIII provides that:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

The Respondent, Richard LeMarbe, is currently an inmate at the Ryan Correctional Facility (Ryan) in Detroit, Michigan. The events surrounding his complaint occurred in 1996 while he was an inmate at the G. Robert Cotton Correctional Facility in Jackson, Michigan (Cotton).

In 1996, the Petitioner, Dr. Jerome Wisneski, was a physician employed by the Michigan Department of Corrections. He is currently employed by Correctional Medical Services.

Mr. LeMarbe arrived at Cotton on April 24, 1996, from the Riverside Correctional Facility in Ionia, Michigan. At that time, Dr. Wisneski was a surgeon at the Duane Waters Hospital (DWH) in Jackson, Michigan.

When Mr. LeMarbe arrived at Cotton, he was a 62-year-old male suffering from bladder stones. He was also a chronic smoker with a history of health problems.

Dr. Wisneski's first contact with Mr. LeMarbe was on July 11, 1996, when he saw him in a surgery clinic. Dr. Wisneski believed that Mr. LeMarbe needed surgery. Dr. Wisneski saw Mr. LeMarbe again on July 16, 1996, and noted that surgery would be performed as soon as possible. Dr. Wisneski performed an operation known as a cholecystectomy on July 22, 1996 to remove Mr. LeMarbe's gallbladder. Two days later, on July 24, 1996, Dr. Wisneski saw Mr. LeMarbe and made an entry on his chart that Mr. LeMarbe was doing well. Dr. Wisneski saw Mr. LeMarbe on the 29th of July and again the next day. At that time, Mr. LeMarbe's abdomen had become distended with fluid. After running a number of tests Dr. Wisneski teamed with Dr. Edgar Eichbaum to perform exploratory surgery on July 31, 1996, to determine if Mr. LeMarbe had a small bowel obstruction, and to determine why he was nauseated and had a distended abdomen. Neither Dr. Wisneski nor Dr. Eichbaum were able to locate the source of the biliary fluid.

Dr. Wisneski next saw Mr. LeMarbe on August 6, 1999. Dr. Wisneski noted that the patient "[W]as frisky and anxious to leave." In fact, Mr. LeMarbe was doing well enough at that point that Dr. Wisneski discharged him. Unfortunately, Mr. LeMarbe's abdomen became distended a second time. Dr. Wisneski kept Mr. LeMarbe under observation at DWH to observe his condition more carefully.

On August 13, 1996, Dr. Wisneski referred Mr. LeMarbe to a gastroenterologist, Dr. Mario Hurtado. He did so to find out why Mr. LeMarbe's abdomen was distended. While Mr. LeMarbe was at DWH, he was observed twenty-four hours a day by hospital personnel.

Dr. Wisneski did not make any entries in Mr. LeMarbe's chart after August 13, 1996. Mr. LeMarbe transferred to Foote Hospital in Jackson, Michigan on August 16, 1996.

Following his stay at DWH, Mr. LeMarbe continued to have problems. He had additional surgeries performed by a surgeon, Dr. Blaine Tacia, at Foote Hospital in Jackson and by other surgeons at the Detroit Receiving Hospital.

Mr. LeMarbe alleged that Dr. Wisneski acted with deliberate indifference and violated his rights under the Eighth Amendment. Mr. LeMarbe also claims that Dr. Wisneski committed the state law tort of gross negligence.

Mr. LeMarbe initially filed his Complaint in Jackson County Circuit Court in Jackson, Michigan, on June 30, 1998. Mr. LeMarbe's original Complaint named the Cotton Correctional Facility, John Doe, Sharon Fairbanks, a dietician at Cotton; Duane L. Waters Hospital; Dr. Wisneski; Dr. Allen Price; and Dennis Straub, the Warden at Cotton, as Defendants.

Dr. Wisneski subsequently removed this matter to the Eastern District of Michigan.

Mr. LeMarbe agreed to dismiss the Cotton Correctional Facility and Duane L. Waters Hospital with prejudice on December 15, 1998.

The Court permitted Mr. LeMarbe to file a First Amended Complaint on May 28, 1999. Mr. LeMarbe did not name Dr. Price or John Doe in his Amended Complaint.

Dr. Wisneski's counsel submitted summary judgment motions on behalf of Wisneski and Defendants Fairbanks and Straub. The Magistrate Judge recommended that Fairbanks and Straub be dismissed. Mr. LeMarbe did not object to the Magistrate Judge's recommendation regarding Fairbanks and Straub. The District Court accepted the Report and Recommendation and dismissed Fairbanks and Straub in an Opinion and Order dated March 31, 2000. (App., pp 23a-29a).

Dr. Wisneski's counsel also filed two summary judgment motions as to Dr. Wisneski, the only remaining defendant. In response to Dr. Wisneski's dispositive motions, Mr. LeMarbe filed an affidavit by Dr. James Sarnelle in which he concluded that Dr. Wisneski acted with deliberate indifference. In the second of these motions, Dr. Wisneski maintained that he was entitled to qualified immunity. On September 22, 1999, the Magistrate Judge recommended that Dr. Wisneski's motion based on qualified immunity should be denied. The District Court adopted the Magistrate's Report and Recommendation of September 22, 1999, in its Opinion and Order of March 31, 2000. (App., pp 23a-29a).

Dr. Wisneski filed an appeal based on qualified immunity on April 12, 2000 in the Court of Appeals.

The Court of Appeals issued an Opinion on September 19, 2001, affirming the decision of the District Court denying Dr. Wisneski's dispositive motion based on qualified immunity. *LeMarbe v. Wisneski*, 266 F.3d 429 (6th Cir. 2001). (App., pp 1a-22a). The Court of Appeals, relying heavily on the affidavit supplied by Mr. LeMarbe, concluded that LeMarbe had "alleged facts that, when viewed in a light most favorable to him would show that Dr. Wisneski was aware of facts from which a substantial risk of serious harm could be inferred." App., p 11a. The Court then went on to conclude that:

> LeMarbe has alleged facts that, when viewed in a light most favorable to him, would show that Dr. Wisneski drew the inference that LeMarbe faced a substantial risk of serious harm from the

> bile leak in his abdomen and that Dr. Wisneski disregarded such risk when he closed LeMarbe's surgical incision on July 31, 1996, failed to refer LeMarbe *immediately* to a specialist who could stop the leak, and also failed to inform LeMarbe of the failure to stop the leak so that LeMarbe could take any additional measures necessary to stop the leak *in a timely manner, i.e.* request medical treatment from a specialist who could stop the leak. [App., p 11a.]

The dissenting opinion in the Court of Appeals concluded that the majority applied an incorrect analysis and gave improper weight to the affidavit, App., pp 20a-22a.

> More importantly, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994), could not have been more clear that it is a subjective standard federal courts must apply in cases such as this. *See Farmer*, 511 U.S. at 829, 114 S. Ct. at 1974 ("This case requires us to define the term 'deliberate indifference,' as we do by requiring a showing that the official was *subjectively* aware of the risk.") (Emphasis added.)[1]
>
> But as is clear from the majority's opinion, the majority applies an objective standard to conclude that Dr. Wisneski may have acted with deliberate indifference towards LeMarbe's serious medical needs.
>
> Nowhere is this more clear than in the majority's relying upon an affidavit from an expert witness, Dr. Sarnelle. To make out the subjective showing that *Farmer* requires, Sarnelle's affidavit would have to say that Sarnelle knows, first, that Dr. Wisneski actually

knew facts from which an inference of excessive risk could be drawn, and second, that Dr. Wisneski actually drew that inference. But Sarnelle's affidavit simply provides Sarnelle's opinion of what Dr. Wisneski or anyone with a medical education should have known. Sarnelle's affidavit thus provides an objective standard, not a subjective one, and this is wholly insufficient to show an Eighth Amendment violation.

* * *

To the extent that the majority points to evidence besides Dr. Sarnelle's affidavit to establish Dr. Wisneski's alleged deliberate indifference, I respectfully disagree. Again, *Williams* and *Farmer* demand that we apply a subjective standard. Here, applying that subjective standard requires LeMarbe to show that Dr. Wisneski actually identified a severed bile duct as the problem and then, despite having identified the problem, Dr. Wisneski sewed up LeMarbe, aware that substantial harm would likely result. But that is simply not what the record evidence shows in this case.

What the undisputed record evidence shows is that both Dr. Wisneski and Dr. Eichum looked for a leak in LeMarbe's bile duct, and when they found no leak, erroneously concluded that there was none and closed LeMarbe's incision. While Drs. Wisneski and Eichum may have committed medical malpractice when they failed properly to diagnose LeMarbe's problem, they did not violate LeMarbe's Eighth Amendment rights. *See Estelle v. Gamble*, 429 U.S. 97, 105-06, 97 S. Ct. 285, 291-92 (1976).[(2)] (Deliberate

indifference does not include negligence in diagnosing a medical condition.).

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[1] *See also Farmer*, 511 U.S. at 837, 114 S. Ct. at 1979 ("We reject petitioner's invitation to adopt an objective test for deliberate indifference.").

[2] *See also Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995) ("Deliberate indifference, however, does not include negligence in diagnosing a medical condition.") (citing *Estelle*, 429 U.S. at 106, 97 S. Ct. at 292).

Dr. Wisneski filed a Petition for Rehearing and Rehearing *En Banc* on October 2, 2001. Subsequently, on December 7, 2001, the Court of Appeals issued its Order denying Dr. Wisneski's Petition for Rehearing *En Banc*. (App., p 30a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the holding of the Court of Appeals is in direct conflict with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994).

Dr. Wisneski maintains that he is entitled to qualified immunity from money damages. Government officials are entitled to qualified immunity when their actions do not violate clearly established constitutional rights. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court of Appeals analysis of qualified immunity is fundamentally flawed because it failed to properly examine the existence of a constitutional violation. Instead it impermissibly equates the constitutional standard of deliberate indifference with the tort standard of negligence. Certiorari should be granted to prevent the Court of Appeals error from infecting other cases.

This Court recently reaffirmed the standard for evaluating claims based on qualified immunity. In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2156; 150 L Ed 2272 (2001), this Court held:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley*, 500 U.S. 226, 232; 114 L.Ed.2d 277; 111 S. Ct. 1789 (1991).
> * * *
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

This Court should grant certiorari because the holding of the Court of Appeals is in conflict with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994).

A. Dr. Wisneski's actions did not violate Mr. LeMarbe's constitutional rights under the Eighth Amendment.

The standard for evaluating claims by prisoners that prison officials have failed to provide medical care that comports with the Eighth Amendment is deliberate indifference. *Estelle v. Gamble*, 429 U.S. 97 (1976); and *Farmer v. Brennan*, 511 U.S. 825 (1994). Deliberate indifference requires a state of mind more blameworthy than negligence. *Farmer, supra*, at 835. The test for deliberate indifference is a subjective test which requires that:

> [T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. [*Id.*, at 837.]

Under the facts of the instant case, Mr. LeMarbe has not established that Dr. Wisneski acted with deliberate indifference. Mr. LeMarbe has done nothing more than set forth facts which might amount to a state law claim for medical malpractice.

This Court further defined deliberate indifference in *Farmer* in holding:

> We hold instead, that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or

> safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation cannot, under our cases, be condemned as the infliction of punishment. [*Farmer, supra*, at 837.]

This Court continued:

> [P]rison officials who actually know of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety." [*Id.*, at 844.]

Dr. Wisneski's actions were reasonable under the circumstances. He treated Mr. LeMarbe numerous times post-operatively; performed exploratory surgery with another surgeon to assist in looking for problems; hospitalized Mr. LeMarbe for close observation; and ultimately referred Mr. LeMarbe to a specialist for further treatment. Consequently, Dr. Wisneski could not have committed a constitutional violation. The Court of Appeals erred by even examining whether Mr. LeMarbe's rights were clearly established.

It is important for this Court to keep in mind that Mr. LeMarbe was under constant observation by medical personnel from the time of his initial surgery on July 22, 1996 until he left for Foote Hospital on August 14, 1996. Dr. Wisneski did not simply close up his surgical incision and send him back to his cell. It should also be noted that Dr. Wisneski called another physician, Dr. Edgar Eichbaum, to assist in the exploratory surgery on July 31, 1996, and then placed Mr.

LeMarbe under observation at DWH. As of August 6, 1996, he noted Mr. LeMarbe was responding well. Following that, he referred Mr. LeMarbe to Dr. Hurtado when his condition did not improve.

The Court of Appeals misinterpreted this Court's decisions in *Estelle* and *Farmer* and applied a purely objective standard to a deliberate indifference claim.

The dissenting opinion in the Court of Appeals correctly indicated that the majority departed from its own *en banc* holding in *Williams v. Mehra*, 186 F.3d 385 (6th Cir. 1999), and this Court's precedent including *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Estelle v. Gamble*, 429 U.S. 97 (1976). *LeMarbe v. Wisneski*, 266 F.3d 429, 441 (6th Cir. 2001); App., p 20a. *Estelle* and *Farmer* clearly established that an Eighth Amendment claim requires both an objective and a subjective element. The majority simply ignored that requirement and focused solely on the objective element. The Sixth Circuit proceeded to step two of the qualified immunity analysis required under *Saucier* without properly determining whether Dr. Wisneski ever violated a constitutional right.

Essentially, the Court of Appeals has equated the deliberate indifference standard set forth in *Estelle* and *Farmer*, to a negligence standard. The Court concluded that the affidavit of Mr. LeMarbe's expert, Dr. Sarnelle, was sufficient to create a genuine issue of material fact. In truth, it did nothing more than raise a question of negligence. The Court's decision undermines *Estelle* and *Farmer* because it equates state law negligence with deliberate indifference.

Dr. Sarnelle's affidavit does not speak to the subjective element of Eighth Amendment claims. It does not, and cannot, address Dr. Wisneski's state of mind. The panel accepted Dr. Sarnelle's affidavit in which he concluded "Jerome Wisneski, M.D. knew that Richard LeMarbe was going to suffer painful and serious internal injuries if the injury was not located and repaired." Dr. Sarnelle cannot testify as to Dr. Wisneski's state of mind. It was incorrect for the panel to place such reliance on Dr. Sarnelle's affidavit to satisfy the subjective element of

an Eighth Amendment claim. The evidence submitted to the District Court and the Court of Appeals does not establish that Dr. Wisneski knew that a substantial harm would result. Even if every aspect of Dr. Sarnelle's affidavit is true, it does not satisfy the subjective element of an Eighth Amendment claim. Not noticing that an inmate exhibits a serious medical need is not a constitutional violation because not noticing that a need exists is not considered "punishment." *Farmer, supra*, at 837-38.

If the Court of Appeals opinion is allowed to stand then there will be no difference between a constitutional claim for deliberate indifference and a state law claim for medical malpractice. The Court of Appeals will have a published decision that will be cited by future litigants that directly conflicts with this Court's cases regarding deliberate indifference dating back to 1976. It is essential that litigants especially physicians willing to work in prisons know, in advance, what legal standards are going to govern their case. The majority's decision calls in to doubt the validity of *Estelle, supra* and *Farmer, supra*. Litigants now will be put in the position of having to cite a case which clearly conflicts with this Court's precedent.

There is no way to distinguish the instant case from *Estelle*. In both cases, a prisoner was given extensive medical care. Unfortunately, the medical care given did not cure the prisoner. *Estelle* is directly on point. In *Estelle*, this Court held that once a medical professional has provided some medical treatment he cannot be found to be deliberately indifferent. When a prisoner receives the amount of medical care that Mr. LeMarbe received in the case at bar, there cannot be a constitutional violation. Thus, under *Saucier*, the Court's inquiry is over. No reasonable prison doctor in 1996 could have known that once he had exercised his professional judgment that he could be constitutionally liable for damages.

In *Estelle, supra*, at 105, this Court concluded:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency."

This Court noted that the inmate in *Estelle* was seen by medical personnel seventeen times. Similarly, medical personnel saw Mr. LeMarbe dozens of times between his initial surgery on July 22, 1996, and Dr. Wisneski's decision to refer Mr. LeMarbe to a specialist on August 13, 1996. Additionally, as noted above, Mr. LeMarbe was in a hospital, observed by medical professionals twenty-four hours a day his entire stay at DWH. Under those circumstances, Dr. Wisneski's conduct could not amount to a constitutional violation and thus, he is entitled to qualified immunity under *Saucier, supra.*

The panel's decision is in conflict with decisions of other circuits as well. For example, the Third Circuit has held:

> If a Plaintiff's disagreement with a doctor's professional judgment does not state a violation of the Eighth Amendment, then certainly no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to

> treat an illness. [*White v. Napoleon*, 897 F.3d 103, 110 (3rd Cir. 1990).]

The Fifth Circuit held in a case similar to the case at bar that the opinion of the plaintiff's expert witness was not enough to create a material issue of fact. *Stewart v. Murphy*, 174 F.3d 530 (5th Cir. 1999) (upholding the District Court's decision to grant summary judgment to two physicians despite the affidavit of the Plaintiff's expert because the Plaintiff did not satisfy the subjective element of *Farmer* and *Estelle*). The facts in *Stewart* parallel those in the case at bar. A prisoner's estate brought a claim against four physicians for deliberate indifference. The prisoner suffered from ulcers on his back beginning in August of 1994. A prison physician, Dr. Dial, ordered that the ulcer be treated with antibiotics. A second doctor subsequently ordered that the dressings should be changed two to three times a day. The second doctor, Dr. Kim, ultimately referred the prisoner to a Dr. Wright at a non-prison hospital. Upon his return to prison, Dr. Kim did not follow Dr. Wright's diagnosis that the prisoner should be transferred to a different facility. Rather, Dr. Kim ordered that the prisoner should be kept out of bed as much as possible and that nurses should move his extremities. A third physician, Dr. Knutson, took over from Dr. Kim and periodically checked the prisoner's wounds and ordered that the prisoner get out of bed for extended periods of time. Dr. Knutson never prescribed antibiotics for the ulcers. On November 30, 1994, Dr. Knutson admitted the prisoner to a non-prison hospital. The admitting physician testified it was the worse case of ulcers he had ever seen. The prisoner died on December 7, 1994 due to the ulcers.

The Court of Appeals concluded the prisoner did not have a valid Eighth Amendment claim under *Estelle* or *Farmer*. Since the physicians had actively treated the prisoner's medical condition, the prisoner's claim failed. *Stewart, supra*, at 537.

Similarly, the Seventh Circuit granted summary judgment to two physicians who failed to prevent a prisoner's suicide

because they exercised their medical judgment in their treatment of him. *Sanville v. McCaughtry*, 266 F.3d 724 (7th Cir. 2001). In *Sanville*, the Court of Appeals rejected the claim a physician's failure to prevent even possible harm might amount to deliberate indifference. Rather, the Court of Appeals concluded that a physician's exercise of his medical judgment could not amount to an Eighth Amendment violation, even if, in hindsight, his decision turned out to be incorrect. *Id.*, at 737. The Court commented, "Although we wish Dr. Pareek could have prevented Matt's suicide, physicians do not practice with a crystal ball in hand." *Sanville, supra*, at 736.

B. Dr. Wisneski did not act in violation of clearly established law.

In *Harlow*, this Court held:

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. [*Harlow, supra*, at 818.]

A court should only proceed to determine whether a right is clearly established if, and only if, there has been a constitutional violation. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Even if this Court determines that Dr. Wisneski could have violated Mr. LeMarbe's rights under *Farmer* and *Estelle*, Dr. Wisneski certainly did not act in violation of clearly established law.

Mr. LeMarbe simply suggested alternate methods of care. Whether Dr. Wisneski could have performed additional tests which could have detected the source of Mr. LeMarbe's problems is not relevant in determining deliberate indifference.

Six years after *Estelle*, this Court held, "[T]he Constitution only requires that the Courts make certain that professional judgment, in fact, was exercised. It is not appropriate for the Courts to specify which of several professionally acceptable choices should have been made . . . ." *Youngberg v. Romero*, 457 U.S. 307, 321 (1982).

Moreover, in *Farmer, supra,* at 844-845, this Court held:

> [P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety," (citations omitted) a standard that incorporates due regard for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions." (Citations omitted). Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.

Clearly, under the circumstances, Dr. Wisneski acted in a reasonable manner. He performed exploratory surgery and ultimately referred Mr. LeMarbe to a specialist. No prison official in 1996 could have known that taking such actions violated the constitution.

Dr. Wisneski delivered extensive medical treatment to Mr. LeMarbe and properly exercised his professional judgment. Mr. LeMarbe simply disputes the adequacy of the treatment.

The Court of Appeals decision is also contrary to an earlier *en banc* opinion of the Court of Appeals. *Williams v. Mehra*, 266 F.3d 429 (6th Cir. 1999), as noted by the dissenting opinion below, App., p 20a:

> In *Williams*, we spoke definitively to the question of what kind of standard (subjective or objective) we must apply in § 1983 cases brought by a prisoner hoping to allege an Eighth Amendment violation because some prison official allegedly acted with deliberate indifference toward the prisoner's serious medical needs. That standard is unequivocally a subjective standard.

By adopting a standard that is in direct conflict with Supreme Court and Court of Appeals precedent requiring a subjective standard for Eighth Amendment claims, the panel should have concluded Dr. Wisneski was entitled to qualified immunity. No reasonable prison physician could have known that a prisoner could state a claim under the Eighth Amendment without satisfying the subjective element of *Farmer*.

No reasonable prison doctor in 1996 could have known that once he had exercised his professional judgment that he could be liable for damages for a constitutional violation. The case at bar is so factually similar to *Estelle* and *Farmer* that this Court must reverse the Court of Appeals decision and hold that Dr. Wisneski is entitled to qualified immunity from money damages.

Mr. LeMarbe went to great lengths in front of the District Court to point out things that Dr. Wisneski could have done differently. That, however, is not the question. As this Court held:

> [T]he question whether an x-ray, or additional diagnostic techniques or forms of treatment are indicated is a classic example of a matter for medical judgment. A medical decision not to order an x-ray, or like measures, does not represent cruel and unusual punishment. At

> most, it is medical malpractice, and as such the proper forum is the state court. [*Estelle, supra*, at 107.]

Simply suggesting alternate methods of treatment does not set forth an Eighth Amendment violation.

In *Saucier, supra*, this Court held that any analysis of qualified immunity had to begin with whether a constitutional violation had even occurred. Under *Farmer* and *Estelle*, Mr. LeMarbe cannot establish that a constitutional violation even occurred. The Court of Appeals should not have ever proceeded to determine whether Dr. Wisneski violated a clearly established right. Once Mr. LeMarbe received care, Dr. Wisneski could not have acted with deliberate indifference. Simply because Dr. Sarnelle had a different opinion does not mean that Dr. Wisneski failed to take reasonable steps to treat Mr. LeMarbe. As the dissenting judge correctly observed:

> To make out the subjective showing that *Farmer* requires, Sarnelle's affidavit would have to say that Sarnelle knows, first, that Dr. Wisneski actually knew facts from which an inference of excessive risk could be drawn, and second, that Dr. Wisneski actually drew that inference. But Sarnelle's affidavit simply provides Sarnelle's opinion of what Dr. Wisneski or anyone with a medical education should have known. Sarnelle's affidavit thus provides an objective standard, not a subjective one, and this is wholly insufficient to show an Eighth Amendment violation. Citations omitted. [*LeMarbe, supra*, at 441; App., p 21a.]

Because the Court of Appeals opinion is in direct conflict with Supreme Court precedent, this Court should grant the Petition for Certiorari and reverse the Court of Appeals.

CONCLUSION

For all of these reasons, Dr. Wisneski respectfully requests this Court to grant Certiorari and reverse the Court of Appeals.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Leo H. Friedman
John L. Thurber
Assistant Attorneys General

Attorneys for Petitioner

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